IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MMILLA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 200 OF 2017

PAUL JUMA DANIEL .....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

dated 16th day of May, 2016
in
(DC) Criminal Appeal No. 62 of 2016

JUDGMENT OF THE COURT

21st & 28th August, 2020

KWARIKO, J.A.:

Paul Juma Daniel, the appellant in this appeal was arraigned before the District Court of Moshi charged with the offence of rape contrary to section 130 (a) (1) (2) (e) and 131 of the Penal Code [CAP 16 R.E. 2002] (the Penal Code). To hide the identity of the victim of the sexual offence we shall only refer to her initials 'AB' who testified as PW1. The prosecution alleged that on diverse dates of July 2015 at Himo Township area within

Moshi Rural District in Kilimanjaro Region, the appellant had unlawful carnal knowledge of 'AB' a girl of 13 years of age.

The appellant denied the charge followed by a full trial. In the end, the trial court found the appellant guilty as charged; it convicted and sentenced him to 30 years' imprisonment and a compensation of TZS 6,000,000.00 to the victim of the offence after completion of the jail term. Aggrieved by that decision, the appellant unsuccessfully appealed before the High Court of Tanzania at Moshi and hence this second appeal before this Court.

We find it apposite at this point to summarize the evidence adduced at the trial as follows. On 17/7/2015, PW1 was at home in Himo Township Moshi Rural District while her parents had gone for work. Whilst there, two persons, a girl and a boy knocked at the door and upon opening the door for the guests, the girl who was familiar asked her to accompany them out. They took her to a certain house called Silent Inn Guest House where the appellant came later at night and raped her repeatedly from 17/07 2015 to 20/07/2015. PW1's evidence was that the appellant as he was having sexual intercourse, he covered her mouth by his hands and in the process, she felt a lot of pains. In the morning, the appellant locked PW1 in the

room and later on brought biscuits for he. The appellant continued to rape PW1 until 20/7/2015 when she was rescued by her parents.

Meanwhile, when PW1's mother Selina Boniface (PW2) and her father Boniface Moshi (PW3) returned from work on 17/7/2015, they did not find PW1 at home. They looked for her in vain and reported the matter to the police. Upon investigation, they got a clue that PW1 was likely to be at the home of one Mercy s/o Kimambo (PW4). On his part, PW4 admitted knowing the appellant as his house boy who, on 17/7/2015, had asked to be given TZS 3,000.00 to buy Petroleum Jelly oil and thereafter he disappeared from home only to surface the following morning. Since the appellant was suspected to be the one who knew the whereabouts of PW1, he was arrested by a militiaman one Moses Aminiel Lyimo (PW6) and agreed to lead to the place where PW1 was kept.

The appellant led the team to Silent Inn Guest House where he had a key to one of the rooms and upon opening it, PW1 was found in that room. A guest house attendant confirmed that it was the appellant who had brought the girl there although she did not testify before the court. Subsequently, the appellant was taken to a police station where he was

interrogated by No. E 547 Detective Cpl. Gabriel (PW5) to whom he was alleged to have admitted the allegations against him.

On the other hand, PW1 was given a PF3 to go to Mawenzi Regional Hospital for examination where she was attended by Dr. Maria Alphonce (PW7). In her examination, PW7 found PW1's vagina open with bruises but with no spermatozoa but concluded that PW1's vagina had been penetrated and recorded her findings in the PF3 which was admitted in evidence at the trial as exhibit P1.

In his defence, the appellant was the only witness for his case. Denying the rape allegations, he stated that he was arrested on 20/7/2015 by three people from his employer's house where he was staying and was taken to the police station. At the station he was asked about one Ayubu whom he did not know and later, one young person he did not know was brought to him. He also denied the allegations of abduction of the complainant. In cross-examination, the appellant denied to have led anyone to Silent Inn Guest House where PW1 was found.

In its judgment, the trial court found that the prosecution proved the case against the appellant beyond reasonable doubt. He was convicted and sentenced as indicated earlier. In dismissing the appellant's appeal, the

first appellate court concurred with the trial court that the evidence on record left no doubt that the appellant committed the offence of rape.

Undaunted, the appellant is before this Court faulting the decision of the first appellate court on eight grounds of appeal. Four grounds are contained in the memorandum of appeal, one ground in the supplementary memorandum of appeal and three as additional grounds raised during the hearing. Striped of the inherent grammatical errors and excessive details, the grounds are sequentially arranged as follows:

1. *That, both the learned trial magistrate and the first appellate judge erred in law and fact by failing to address themselves to the requirements of section 131 (2) (a) the only punishment to the appellant would have been corporal punishment not the illegal sentence of thirty (30) years in jail;*
2. *That, both the learned trial and the first appellate judge erred in law and fact in not finding that the prosecution evidence was full of doubts;*
3. *That, the prosecution failed to prove its case to the standard required by the law by its failure to summon the guest house attendant who was a key witness as the trial court ought to have drawn an adverse inference against*

the prosecution as there was no the appellant was arrested on the alleged material moment.

4. *That, both the learned trial magistrate and the first appellate Judge miserably failed to scrutinize the evidence as regards the identification of the appellant;*
5. *That the first appellate judge erred in law by sustaining the appellant's conviction while the charge sheet was defective for omission to cite sub-section (1) of section 131 of the Penal Code;*
6. *That, the defence evidence was not considered thus contravening section 312 (1) of the Criminal Procedure Act [CAP 20 R. E. 2002];*
7. *That, the PF3 was not read over in court after its admission as an exhibit; and*
8. *That, the first appellate judge did not consider all grounds of appeal.*

At the hearing of the appeal, the appellant did not physically appear in Court but was linked from prison through a video conference facility, and was unrepresented. On its part, the respondent/ Republic was represented by Mr. Kassim Nassir, assisted by Ms. Lucy Kyusa, both learned State Attorneys.

Amplifying his grounds of appeal, the appellant argued that whilst his conviction was against the weight of evidence, the sentence meted out to him was unlawful. This is so, the appellant argued, because at the time of the offence, he was aged 18 years and so the appropriate sentence would have been corporal punishment and not jail sentence. He submitted further that the prosecution witnesses contradicted themselves in their evidence such that while PW2 and PW3 stated that he was arrested at his employer's home, PW6 said he was arrested at the guest house.

He went on to argue that the guest house attendant who was a crucial witness ought to have been called to testify to give credence to the prosecution's claim that he was arrested at the guest house. He contended further that it was incumbent for the prosecution to produce the guest house register book in evidence to prove if his name was registered therein as a guest in that guest house.

As for his identification, the appellant complained that since PW1 stated that she did not know him before and her assailant used to come at night, identification parade was necessary but the prosecution did not conduct any identification parade. Lastly, the appellant argued that the

prosecution ought to have also cited sub-section (1) of section 131 of the Penal Code.

Ms. Kyusa who argued the appeal for the respondent, expressed her standpoint opposing the appeal. However, she supported the first ground of appeal and argued that according to section 131 (2) (a) of the Penal Code, the appellant who was aged 18 years at the material time and as a first offender, was supposed to be sentenced to corporal punishment. The learned State Attorney implored the Court to revise the sentence and impose the appropriate one. Considering that the appellant has been in custody for more than four years serving an illegal sentence, the learned State Attorney was of the view that there was no need to impose another punishment.

In relation to the second ground of appeal, Ms. Kyusa argued that the prosecution evidence was not contradictory as contended by the appellant. She submitted that PW1 testified that the appellant raped her for three days and her evidence was corroborated by PW7, a medical doctor who conducted an examination and found her vagina open with bruises which was sufficient proof of penetration. However, the learned

State Attorney conceded that the PF3 (exhibit P1) which is subject of the complaint in the seventh ground of appeal was an invalid evidence as it was not read over after admission. She urged us to expunge it from the record. The learned State Attorney submitted further that even after expunging the PF3, the oral evidence of PW7 was sufficient to support PW1's evidence. She buttressed her position relying on the case of **Shaban Ng'ombe Kenyeka v. R,** Criminal Appeal No. 454 of 2016 (unreported).

As to the complaint in relation to the place of arrest of the appellant, Ms. Kyusa argued that contrary to the appellant's contention in ground two, there was sufficient evidence from PW2, PW3 and PW6 who said that he was arrested at PW4's house where he was working and led the team to Silent Inn Guest House where the victim was found. She argued that the fact that not all of the three witnesses mentioned both places of arrest did not dilute their evidence that the appellant was arrested on the material date and led them to the Guest House where PW1 was found in one of the rooms. She submitted that the alleged contradictions regarding the place of arrest, if any, were immaterial because they did not go to the root of the case.

In relation to the complaint regarding the failure to summon the guest house attendant which is the subject of the appellant's contention in the third ground of appeal, Ms. Kyusa argued that she was not an important witness as far as proof of rape was concerned. She submitted that in rape cases, the best evidence is that of the victim of the offence and in this case, PW1 did not say the attendant witnessed the rape. It was the learned counsel's further submission that PW2 said the guest house attendant was also arrested in connection with this case and hence she was not a material witness whose absence could have warranted the trial court drawing adverse inference against the prosecution. However, she quickly conceded that under section 142 of the Evidence Act [Cap 6 R.E. 2019] prescribes an accomplice is a competent witness and so the arrest of the guest house attendant was immaterial. After all, Ms. Kyusa argued that the guest house register could only have showed PW1's name and not the appellant's and thus failure to call the guest house attendant did not prejudice the appellant. To fortify the foregoing, she cited the decision of the Court in **Mabala Masasi Mongwe v. R,** Criminal Appeal No. 161 of 2010 (unreported).

In the fourth ground of appeal, Ms. Kyusa agreed that the victim did not explain how she identified her rapist but there is sufficient evidence to prove that the appellant was the perpetrator of the crime. This is so because, PW2 testified that the appellant admitted the allegations and led the search team to find the victim, and therefore there was no need for an identification parade.

The learned State Attorney argued in respect of the fifth ground of appeal that although the charge omitted to cite subsection (1) of section 131 of the Penal Code, the same was not prejudicial to the appellant. According to her, that section was a punishment provision and the omission to cite the sub-section was not fatal; it is curable under section 388 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA).

Regarding the complaint in the sixth ground of appeal, Ms. Kyusa was in agreement with the appellant's complaint that the trial court did not consider the defence evidence. In relation to the eighth ground of appeal the learned State Attorney argued that only one ground was not considered by the first appellate Judge concerning the proper sentence which ought to have been imposed. She reiterated her arguments in the

first ground of appeal. To wind up, the learned State Attorney argued that the appellant was correctly convicted save for the illegal sentence which was meted out to him.

In his brief rejoinder, the appellant argued that he did not confess to the allegations before PW2 and PW4, more so because PW4 did not testify to that effect. He reiterated that the guest house attendant ought to have been summoned to testify and that the PF3 was a crucial evidence to prove penetration. He urged us to allow his appeal.

We have gone through the grounds of appeal and the evidence on record and now we are set to determine the appeal in the light of the arguments advanced for and against. We wish to state at the outset that this being a second appeal, the law is settled that is; unless there has been a misdirection or non-direction of the evidence occasioning a miscarriage of justice, the second appellate court as in this case, is not entitled to interfere with concurrent findings of the two courts below. See for instance the Court's decisions in **Mbaga Julius v. R,** Criminal Appeal No. 131 of 2015, **Nchangwa Marwa Wambura v. R,** Criminal Appeal No. 44 of 2017 and **The Director of Public Prosecutions v. Simon Mashauri,** Criminal Appeal No. 394 of 2017 (all unreported).

We find it convenient to start with the second, fourth and seventh grounds of appeal. Essentially, the appellant's complaints under those grounds is that the case against him was not proved on the required standard because: Firstly, the prosecution evidence against him was contradictory and doubtful, secondly, he was not properly identified as the one who raped PW1 and thirdly, the PF3 (exhibit P1) was improperly admitted. It is trite law that in rape cases involving girls below 18 years of age, the prosecution must prove two ingredients that is to say; existence of penetration on the victim's vagina and that the victim of rape was below the age of 18. As for the first ingredient, it is settled law that the best evidence in sexual offences comes from the victim herself. There is a plethora of the Court's pronouncements to that effect which include: **Ally Ramadhan Shekindo & Another v. R,** Criminal Appeal No. 532 of 2017, **Mohamed Said v. R,** Criminal Appeal No. 145 of 2017 and **Leonard Joseph @ Nyanda v. R,** Criminal Appeal No. 186 of 2017 (all unreported). In the case of **Ally Ramadhan Shekindo** (supra), the Court made reliance to its earlier decision in **Ndikumana Philipo v. R,** Criminal Appeal No. 270 of 2009 (unreported) where it was stated thus:

"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent and in case of any other women where consent is immaterial that there was penetration".

In our case, the victim was aged 13 years and therefore consent was immaterial. What ought to have been proved is whether there was penetration and whether the appellant was the perpetrator. PW1 said that her rapist used to insert his male organ into her female organ and she felt pains which connotes that she was penetrated. Although this evidence could have been sufficient to prove that there was penetration, it was also supported by the evidence of the medical doctor, PW7 who stated that in her examination of the victim, she found the vagina open with bruises though there were no sperms. The PF3 (exhibit P1) on which PW7 posted her findings after examination of the victim could have also supported PW1's evidence but since as conceded by the learned State Attorney its contents were not read over after admission, it was not a not a valid evidence. Being invalid, it is hereby expunged from the record on the authority of **Robinson Mwanjisi & Three Others v. R** [2003] T.L.R 218 and **Omari Said @ Mami & Another v. R,** Criminal Appeal No.

99/01 of 2014 (unreported). That notwithstanding, PW7's evidence remains intact to corroborate PW1's evidence that penetration was proved consistent with our previous decision in **Shaban Ng'ombe Kenyeka v. R** (supra).

The next issue is whether it is the appellant who sexually assaulted PW1. PW1 stated that though the first encounter with her rapist was at night, she saw him in the morning and the following three days he had been raping her and bringing biscuits for her. That evidence was not controverted in cross-examination and so there is no doubt that she properly identified him. Accordingly, we do not agree with the learned State Attorney's submission that the appellant was not identified by PW1. Likewise, when PW2, PW3 and PW6 went to PW4's home where the appellant was working, they found him after getting a clue to that effect and the appellant led them to the Guest House where they found PW1 locked in a room which he opened with a door key he had in possession.

The appellant tried to challenge that the three witnesses contradicted each other in relation to where he was arrested but as correctly argued by the learned State Attorney, since the appellant was found at PW4's home and led the team to the guest house where PW1 was found, any of them

could have mentioned any of the two places as the appellant's place of arrest. There was thus no any contradiction on that issue. The appellant also complained that PW4 did not say that he admitted the rape allegations but we find this complaint immaterial because the appellant led the search team comprised of PW2, PW3 and PW6 to the guest house where PW1 was found. That connoted that he was the perpetrator. After all, PW4 was not led to state such fact during his testimony and so he cannot be faulted for not mentioning the same. To cap it all, the appellant also did not cross-examine PW4 on this issue having heard the testimony of PW2 and PW3 who had stated that he confessed to the allegations. The law is settled that failure to cross-examine on a certain issue amounts to an admission. See for instance, **George Maili Kemboge v. R,** Criminal Appeal No. 327 of 2013 (unreported). For what we have shown above, we dismiss the second and fourth grounds of appeal and allow the seventh ground.

In the third ground of appeal, the appellant's complaint is that the trial court erred for not drawing adverse inference against the prosecution for the unexplained failure to call the guest house attendant to testify. It is our considered view that having discussed the issue of identification by PW1 and in view of the uncontroverted evidence that the appellant led the

police and the victim's parents and opened the room for them, we are satisfied as the two courts below did that, he was responsible for the offence. The guest house attendant was not a crucial witness in respect of the role she played to identify the appellant. This ground too fails.

With regard to the fifth ground of appeal, we agree with both sides on the omission to cite sub-section (1) of section 131 of the Penal Code. As rightly argued by the learned State Attorney, this omission is not fatal because it is only a punishment provision which is curable under section 388 of the CPA. This ground succeeds to that extent only.

In the sixth ground of appeal the Court is in agreement with the appellant and the concession by the learned State Attorney that the trial court did not consider the defence evidence. The trial court was enjoined to consider both the prosecution and the defence evidence before it made its conclusion on whether or not the appellant was guilty of the offence charged. The same error was committed by the first appellate court when it determined the appeal without reference to the defence evidence. Having found that the two courts below did not consider the defence evidence, the question which follows is the way forward. Luckily, the Court has had occasion to deal with a similar issue in various cases. In **Joseph**

Leonard Manyota v. R, Criminal Appeal No. 485 of 2015 (unreported), the lower courts did not consider the defence evidence. The Court found the answer from its previous decisions in **Salum Muhando v. R** [1993] T.L.R 179 and **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R 149 stepping into the shoes of those courts to consider the defence evidence. The Court stated that:

> *"In our present case, the complaint that the appellant's defence was not considered by both courts below warrants our interference. We are therefore set to analyze the appellant's defence and weigh the same against that of the prosecution witnesses in relation to the matter at hand".* [At page 22]

Consistent with above authorities we will do what the courts below ought to have done. It is plain from the record that the appellant's defence was not complicated. He testified that he was arrested from his employer's house on 20/7/2015 and was taken to a police station where he was implicated with this offence which he did not commit. Weighed against the testimonies of the prosecution witnesses, it is not hard to see that it did not shake the prosecution evidence against the appellant on his

involvement in the commission of the charged offence. It is thus obvious that the fact that the two courts below did not consider his evidence, the appellant has not succeeded in persuading us to disturb the verdict against him. Ground six is likewise dismissed.

The appellant's complaint in the eighth ground of appeal is that the first appellate court did not consider all grounds of appeal. It is plain upon perusal of the first appellate court's judgment that the learned Judge discussed the appellant's complaints generally. However, that is not the same as saying that that approach was fatal because an appellate court does not have to deal with the grounds of appeal sequentially as listed in the memorandum of appeal. It may address the grounds generally and determine the decisive ground of appeal only or discuss each ground separately. However, in doing so it must consider all the complaints raised by the appellant. We agree that in the course of generalization of the appellant's complaints the first appellate Judge did not consider one crucial ground of appeal regarding the propriety of the sentence imposed against the appellant. Apparently, the respondent/Republic did not contest that ground. Needless to say, this complaint forms the basis of the first ground of appeal which we are going to determine shortly.

The appellant's ground of complaint in the first ground is that the trial court ought not to have imposed a custodial sentence against him rather a corporal punishment. Section 131 (2) (a) of the Penal Code provides that:

> *"(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall–*
>
> *(a) if a first offender, be sentenced to corporal punishment only".*

It is clear from the above that when the offence of rape is committed by a boy who is eighteen years or less, he should only be sentenced to corporal punishment. In the present case the appellant who was eighteen years of age when he committed the offence was sentenced to an illegal sentence of thirty years' imprisonment and compensation of TZS 6,000,000.00 to the victim of the offence in contravention of the clear provisions of section 131(2) (a) of the Penal Code. That sentence cannot be allowed to stand and so we hereby quash and set aside as it was an illegal sentence. As to the way forward, we agree with the learned State Attorney that since the appellant has been in custody for more than four years serving an illegal sentence, we do not find it appropriate to impose the correct sentence.

For the foregoing reasons, the appellant's appeal has no merit and it is hereby dismissed save for the sentence which we have revised as shown above. Having found it inappropriate to impose another sentence, and in view of the fact the appellant is serving an illegal sentence we order his immediate release from prison unless his continued incarceration is related to some other lawful cause.

DATED at **ARUSHA** this 27th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgement delivered this 28th day of August, 2020 in the presence of the appellant in person through Video facility and Mr. Charles Kagirwa learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL